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Supreme Court, U.S.
FILED
DEC 11 2006
OFFICE OF THE CLERK

No. 061425

IN THE

SUPREME COURT OF THE UNITED STATES

DELANEY E, SMITH JR.,M.D. *PRO SE*

PETITIONER

v.

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY,
HERTZ CLAIM MANAGEMENT CORPORATION, ET. AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DELANEY E. SMITH JR.,M.D.
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QUESTIONS PRESENTED

(1.) Whether, ***United States Constitution Article III section 2.,*** extends **subject matter jurisdiction** for the United States Court of Appeals, and District courts to make rulings, in state workers compensation law related cases that have been removed to District court in violation of *28 U.S.C. section 1445 (c)*, or should all such cases be remanded to the court from which it was removed, as statue appears to read.

(2.) Whether, rights when based upon **subject matter jurisdiction** defense can be waived, when civil case is state workers compensation law related, and protected from removal under *28 U.S.C. sec. 1445 (c);* thereby creating jurisdictional authority for District/ Appeals Courts to rule on merits of case.

PARTIES TO THE PROCEEDINGS

Petitioner is Delaney E. Smith Jr. Pharm.D.,M.D., proceeding pro se [Supreme Court Rule 33.2(a)]

Respondents are the employer Los Angeles Metropolitan Transit Authority, and it's workers compensation third party administrators and or insurers, and agents, Hertz Claim Management Corporation; Presidium Inc. Cambdridge Integrated Services, Travelers Indemnity; Travelers Indemnity Company of Illinois; Constitution State Services Co., Affordable Medical Network/ First Health Corp. and AON Corporation

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***References to Appeal all relate to Amended Appeal filed and accepted by Ninth Circuit Court of Appeals.**

Petition for Writ of Certiorari

Petitioner Delaney E. Smith Jr.,M.D., respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit Case No. 05-055370 and Los Angeles District Court for the Central District of California - Western Division, Case No. CV-00-05986-NM (CWx) .

Opinions Below

The opinion and denials of Petitions For Rehearing by the U.S. Ninth Circuit Court of Appeals in this case are unreported and reproduced in the Appendix
The opinions of the District Court are unreported and are reproduced in the Appendix at App. 2a + 10a .

National Importance

The rulings of the **United States Supreme Court** in this case are of national importance and there is great urgency, in that the "jurisprudence" of Ninth Circuit pertinent to "non-removable cases" , and forum selection protection, provided under **Title 28 U.S.C. section 1445(c)**, contravenes this statue, and conflicts with other U.S. Circuit Appeal Court rulings, including but not limited to the...Third, Fourth, Fifth, Sixth, Seventh, Eighth... U.S. Circuit Courts of Appeal, and done so with great waste to the tax payers of the United States of America.

Additionally, the rulings by the Ninth Circuit Judicial Panel of Farris, Boochever, and Leavy contradict prior rulings of the State of California Supreme Court, the State of California Workers Compensation Appeals Court, and... even their own past rulings as set forth herein. The rulings of other Circuit Courts also contradict the rulings of one another pertinent to **28 U.S.C. section 1445 (c)**, thereby necessitating a clear, and unequivocal ruling by the United States Supreme Court as set forth herein.

Jurisdictional Authority of the Supreme Court

The Memorandum of the United States Court of Appeals for the Ninth District was filed in this case on August 4, 2006.Document entitled Petition For Rehearing (FRAP 40); With Request to Vacate All Rulings and Judgements, and to Remand to Superior Court, and For Appellate Commissioner to Award All Available Sanctions (including Sanctions for Appellees Failure to Send Notification of Their Decision Not to Respond to Appeal) **[Lack of Subject Matter Jurisdiction]**, was timely filed via U.S. express mail on August 17, 2006, and filed by the Appeals court on August 21, 2006 with grant for extension of filing at that time. The court did not address the issue of **lack of subject matter jurisdiction,** before denying the petition. The same Petition for Rehearing etc... included a Petition for Hearing En Banc and was denied by the Court on September 15, 2006. The Petition for writ of certiorari was timely mailed on December 11, 2006, under *28 U.S.C. sec. 2101 (c); Supreme Court 13.1 (2).*, but was returned, by the Clerk with a 60 day extension in that inadvertantly, no check was enclosed, and format the was not correct.

"The time for filing the certiorari petition begins running anew from the date rehearing is denied..... **[Supreme Court rule 13.3; Hibbs v. Winn, 54c2 U.S. 88, 97-98, 124 S. Ct. 2276, 2283-2284 (2004).**

Document entitled, **Petition For Full Court Hearing – Lack of Subject Matter Jurisdiction to Rule on Merits; Failure to Rule on Appellate Issues; Alternatively Request for Certification of Orders and Appellants Filings For Certiorari Appeal [U.S.C. sec. 1445 (c)] with Request for Judicial Notice Attachments A and B [under General Order 5.8.a],** was timely filed via United States overnignt mail on September 28, 2`06, and filed by the court on September 29, 2006. The Ninth Circuit court did not address the issue of lack of subject matter jurisdiction, before denying the petition. The Petition was denied by the Court on October 30, 2006.

Document entitled **Addendum to Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction to Rule on Merits; Failure to Rule on Appellate Issues: Alternatively, Request for Certification of Orders and Appellant's Filings For Certiorari Appeal [28 U.S.C. sec 1445 (c)]** was filed via U.S. express mail on October 19, 2006., and filed by the court of Appeals on October 20, 2006. The document was returned by the clerk with the instructions that it must be resubmitted within 60 days, when the filing cost of $300.00 inadvertantly was not included. The format has been revised,

Subject Matter Jurisdiction can be raised at anytime during the Appeals process, and the **Petition for Rehear-**

ing and Petition for Full Court Review opened the question of Lack of Subject Matter Jurisdiction, which the court had an obligation to review before the dismissal. The Ninth Circuit had previously found that lack of subject matter jurisdiction is never waived and may be raised at any time by either party or by the court.

See Attorneys Trust v. Videotape Computer Products, Inc 93 F. 3d 593-95 (9th Cir. 1996). Because it affects the court's very power to adjudicate, delay in raising lack of subject matter jurisdiction does not waive ground. The objection can be raised initially at trial, or even on appeal. **[FRCP 12 (h)(3)]**

The rulings of the district/ appeals court are a legal nullity, in that a decision reached without jurisdiction is a legal nullity, and therefore "not a decision at all. The jurisdictional defect prevents the defective decision from ever becoming final. **See Watts v. Pickney, 752 F 2d 406, 409 (9th Cir. 1986) decision reached by district court lacking jurisdiction is "void" for purposes of *Fed. R. Civ.P 60 (b)(4).***

United States Supreme Court has the jurisdictional authority to determine jurisdiction of inferior courts. Whether, case should have been remanded to the state court from which it was removed, upon determination by District/ Appellate courts that they lacked jurisdictional authority to adjudicate state of California workers compensation law related causes of action is within the jurisdictional authority of the **United States Supreme**

Court. The **Supreme court** has found that, if the record discloses that the lower court was without jurisdiction this court will notice the defect, even if the parties make no contention concerning it.. When the lower court lack[s] jurisdiction, the Supreme court has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." **See - United States v. Corrick, 298 U.S. 435, 440 [56 S. Ct. 829, 831, 80 L.d. 1263] (1936) . Arizonians for Official English v. Arizona, 520 U.S. 43, 73, 117, S. Ct. 1055, 1071-1072, 137 L.Ed.2d 170 (1997), Also see Bender, v. Willamsport Arena School Dist., 475 U.S. 534, 541, 106, S. Ct. 1326, 1331, 89 L.Ed.2d 501 (1986) (brakets in original) See -Steel Co. v. Citizens For A Better Environment 118 S. Ct. 1003, 1013, (1998).**

ADDITIONAL GROUNDS FOR U.S. SUPREME COURT JURISDICTION:

The ruling of the Ninth Ciricuit, contradicts earlier rulings of the State of California Supreme Court as well as U.S. Court of Appeals rulings in other Circuits as set forth above. Under Rule 10 (a) the Supreme Court may consider cases in which, a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a state court of last resort.

Case Presently Before U.S. Supreme Court Is Unique

Unlike the plaintiff medical groups in the California

Supreme court case Vacanti v. State Compensation Insurance Fund, the petitioner in the case that is presently before this court, submitted some of the same issues that had been filed in state court [Superior Court]; and were later reviewed in Federal Court, to the State of California Workers Compensation Appeals Court [WCAB] for review. The related opinion of WCAB judge Pamela Faust was attached to the Second Amended Complaint as Exhibit 20, and to the Appeal filed at the U.S. Court of Appeals as ER 331-336. Thus it can be seen that prior to most of the rulings of the federal court the WCAB judge had already ruled on the matter of MTA's Laches argument, and the judge set forth the reasons in her opinion that "said claim is not barred by the doctrine of laches or equitable estoppel" which was later contradicted by the ruling of federal court judge Manela.

Outside of the state Superior Court from which it was removed, the United States Supreme Court is the only forum, available to the Petitioners because it is the only federal court that can review the particulars of this case, because the District court and U.S. court of Appeals have limited jurisdiction that do not allow them to review or weigh the decisions of a state appeals court [WCAB]. Federal district courts may exercise only original jurisdiction, they may not exercise appellate jurisdiction over state court decisions. **See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 – 16, 68 L.Ed. 362, 44 S. Ct. 149 (1923).**

The **United States Supreme court** has exclusive

jurisdiction to review state appellate [WCAB] decisions. Feldman, 460 U.S. at 486; also see 28 U.S.C. sec. 1257. The case presently before the U.S. Supreme Court is one in which the Ninth Circuit Panel of Browning, Farris , and Leavy... directly contradict themselves, and the Panel of Farris, Boochever, and Leavy in that they earlier ruled that because the resolution of the claims at issue would require a review of the merits of the WCAB's and the state court's decision, the district court did not err by concluding that it lacked subject-matter jurisdiction over the claims. The Appeals court cited **Feldman. 460 U.S. at 484-86; Mc Nair, 805 F. 2d at 892-93**.[Leonard *Sherman, Plaintiff-Appellant v. Joan D. Berlin, d/b/a JDB Properties et. al.*] U.S. Appeals Court No. 94-55441 filed October 6, 1994.] (unpublished)

The case presently before the Supreme court is one in which following removal, both the plaintiffs and defendants repeatedly advised the court that it lacked jurisdictional authority over the case. The District court even acknowledged it's lack of jurisdictional authority, but then failed to remand, but chose instead to dismiss those causes of action "with prejudice".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution Article III section provides that the judicial power of the United States is vested in the Supreme Court, "and such inferior Courts as the Congress may from time to time ordain and establish" Congress therefore confers jurisdiction upon federal district courts, as limited by **U.S. Constitution**

Article III section 2., See *Ankenbrandt v. Richards*, 504, U.S. 689. 697-99, 112 S. Ct. 2206, 2212 (1992).

2. **Title 28 U.S.C. section 1445 (c)** provides that a civil action in any state court arising under workers compensation laws of such state may not be removed to any district court in the United States.

STATEMENT

Petitioner seeks review of the Ninth Circuit Court ruling which in addressing petitioner's Appeal that was based upon Lack of Subject Matter Jurisdiction, and 28 U.S.C sec. 1445 (c), the Appeals court cited ***Vasquez v. North County Transit District.*, 292 F. 3d 1049, 1061, (9th Cir. 2002)** and held that.. Moreover, Smith failed to timely object to removal and thus waived any objection on that basis. The court also ruled that even if sec. **1445 (c)** otherwise applies here, it's bar against removal of workers compensation claims is nonjurisdictional and may be waived". See Appeals Court Memorandum p. 3 . **The latter of which is the primary issue before the Supreme court, though the court is reminded that the petitioner also contends that the initial motion for remand was timely filed within 30 days of receipt of notice of removal as set forth herein.**

Petitioner seeks review of the Ninth Circuit Court of Appeals ruling because it is in conflict with the rulings of the State of California Supreme Court in **Vacanti v. State Compensation Insurance Fund** et. al., which identifies the State of California Workers Compensation Appeals court as having the exclusive right to make jurisdictional determinations pertinent to state of California workers

compensation law related cases. **See California Supreme Court No. BC116099, Filed January 4, 2001; Court of Appeals 2/5 Los Angeles County No. B114190.** Accordingly the District/ Appeals court had no jurfisdictional authority to dismiss any causes of action from the complaint, or to make any decisions in the case except for the decision to remand.

Petitioner seeks review of the Ninth Circuit Court of Appeals rulings because it is conflict with federal statue **Title 28 U.S.C. section 1445 (c).** Petitioner seeks review of the Ninth Circuit Court of Appeals ruling because it is in conflict with rulings of State of California Workers Court of Appeals [WCAB]; State of California statues and regulations as set forth herein.

Petioner seeks review of Ninth Circuit Court of Appeals ruling because it is conflict with it's own prior rulings, in that the Ninth Circuit has ruled that, jurisdictional Issues are generally not waivable. The court went on to explain that consequently, parties can ordinarily challenge both district court's and the Ninth Circuit's jurisdiction at any time during the appeal process. **See- [California ex rei. Sacramento Metro. Air Quality Mgt. Dist. v. United States 215 F3d 1005, 1009 (9th Cir. 2000)].** Simularly in other cases the Ninth circuit has previously ruled that jurisdiction over an appeal is open to challenge at any time, and that a party cannot waive it's right to challenge the appellate court's jurisdiction. **[Fiester v. Turner, 783 F2d 1474, 1475 (9th Cir. 1986); also see Miller v. Marriott Intl, Inc., 300 F 3d 1061, 1063 (9th Cir. 2002).**

The Employer Los Angeles MTA, and it's agents acting

as it's workers compensation third party administrators, reinsurer, and or as a PPO Network, took PPO deductions illegally from medical providers, and or hospitals who treated injured workers, in that they were not authorized Adminstrative Director approved, workers compensation Healthcare Organizations (HCO.s) as required under **Title 8 Cal. Code of Reg. 9770, 9771.** The Appellees, each of them, had made, or recommended the making payments for medical services rendered, below those established and required in the State of California Industrial Fee Schedule, which was never disputed. **See labor code sec, 4609.[Appeal p.31].**

Additionally, in the instant case, after referring employees to the petitioner for treatment, the Employer [MTA] oftentimes failed to pay any portion of the medical bills for many years and then failed to pay 10% penalty and 10% per annum interest as required under ***labor code section 4603.2,*** **and** ***Title California Code of Regulations 9792.5.*** It is through these acts and various other acts that MTA and it's contractors engaged in State of California workers compensation related faud, as set forth in the Original Complaint filed in state court. In a scheme to avoid paying employee benefits. which included the payment of medical bills, in 1998 MTA claimed it was no longer "self insured" and that it's workers compensation program was "fully insured by Travelers". Travelers later denied MTA's claim in it's Admissions, contradicting the MTA's Admissions, which under federal law was enough by itself to defeat related Motion for Summary Judgment.**[See Appeal p. 29-33]**

Additionally, the case involved the fraudulent award of

workers compensation related contracts, judicially forced arbitration with respondent First Health without a hearing, to determine the parties, and related threats of case dismissal for failure to arbitrate. District court lacked jurisdictional authority, over arbitration matters that require state law for adjudication **[California Code of Civil Procedure, Title 9, section 1280 et. seq.]** as set forth in the workers compensation related [Occupational Urgent Care Healthcare "OUCH" (later known as First Health) sec. 10.3] contract between the parties, attached to the **Original Complaint [ER 138, 159]; and the Second Amended Complaint [ER 272].**

A third party to the case, the mediator who was himself a retired judge told Dr. Smith that he should settle the case for $100,000.00 offered by MTA, and $30,000.00 offered by each of the defendants... because the petitioner Dr. Smith "had been a victim of MTA corruption, to a greater extent than racial discrimination", and that the District court judge Nora Manella had no intention of allowing the case to go to trial. Petitioner, Dr. Smith requested her self recusal, a protection provided under **28 USC sec. 455 (a)**, but in violation of the statue, the judge refused "self recusal" when a second district court judge ....Judge Lew intervened on her behalf...thereby interfering with, and providing an avenue by which she circumvented the "self recusal" process. Interference in the self recusal process, is the standard of practice in the Los Angeles district, in that Judge Lew's clerk explained to Dr. Smith that ..."self recusals do not occur in this court"????

Although **28 U.S.C section 455 (a)** is stated in terms of

a judge's self-enforcing obligation, it may be invoked by a party. **See [*In re Manoa Finance Co. Inc.*, 781 F2d 1370, 1373, 9th Cir.1986)]** In still another case Dr. Smith had requested the self recusal of Judge Lew under **455 (a).** However, consistent with his clerk's claim, Judge Lew failed to recuse himself, and the self recusal process was ultimately interupted by another judge. The related case U.S Court of Appeals Docket Number CV 06-03918-RSW, had been removed to federal court from Superior court in Monterey Park, California by petitoner Dr. Smith.

Instead of recusing himself, as requested by Petitioner Dr. Smith in that case, because of his perception of past judicial improprieties, in the MTA case, presently before the U.S. Supreme Court ... judge Lew ignored the petition for recusal entitled Notice of and Motion for Reconsideration of, Order Denying Motion to Remove and Remanding to State Court; Request for Self Recusal of District Court Judge Ronald S.W. Lew [Re: Forfeiture of Superior Court's Subject Matter Jurisdiction –Failure to Rule], filed in District Court on August 28, 2006, and he remanded the case on September 5, 2006, according to the court's docket. [but unsuccessfully]

Judge Lew.'s remand effort to Superior court in that particular case failed. After first misidentifying guardian and grandparent Dr. Smith as a... defendant, rather than Plaintiff... a misrepresentation that was reflected throughout the Court Docket... in his haste, to rid himself of that case the district court mailed the remand related documents to the... wrong Superior Court, which then returned the case to federal court [jugde Lew] at about the same time that an Appeal was being filed with the U.S. Court of Appeals.[Related documemtents available.]

Now, pertinent to the case that is presently before this court, in confirmation of the petitioner's perception of impropriety, Judge Manella refused to remand the case, even though several Motions for Remand based upon lack of subject matter jurisdiction were filed by the petitioner, and the issue of lack of subject matter jurisdiction was at times even raised by the Appellees, each of them, for purpose of having "causes of action" dismissed with prejudice, which was eventually granted.

Ultimately, judge Manella would award the Respondents Motions for Summary Judgement, even though their filed Statements of Undisputed Facts were so badly flawed, that the clerk stamped them as "not used", and they were not entered into the record. Judge Manella is no longer a judge in the federal system. The Appeals court failed to rule on the issues presented in the Appeal that were raised by judge Manella's rulings. Instead of ruling on the issues, identified in the Appeal, ...the U.S. Appeals Court ruled on the merits of the case, but pertinent to only one Appellee, the MTA ...while failing to make rulings pertinent to the other Appellees. The Appeals Court ruling suggested that violations of federal statue sec. 1445 (c), created "procedural" defects that are "nonjurisdictional". The U.S. Appeals court did not explain how it arrived at the conclusion that "Smith failed to timely object to removal...".

The initial Motion for Remand was timely filed, for Dr. Smith by his attorney Robert Ramsey Jr. To the contrary the MTA's Motion for remand was served late on Petitioner/ Plaintiffs. Petitioner's Original Summons and Complaint was served on the MTA [removing party] on

May 5, 2000. MTA's Motion for Removal was filed on June 2, 2000 but MTA failed to serve the Petitioner or Plaintiffs in the case, or to include them on the servce list. The court is reminded that in removals based upon a "federal question as in this case, there is no 30 day requirement to file Motion for Remand. There were several subsequent Motions for Remand,each of them, was based based upon "lack of subject matter jurisdiction", for which there is no 30 day limitation.

Removing party' [MTA's] Proof of Service on Notice of Removal of Action under 28 U.S.C. sec. 1441 (b) (Federal Question) was served on the Plaintiffs late [not until June 30, 2000]. [See Appeal ER 449; and Court docket # 12- ER 448]. Petitioner's response, while it might have appeared to have been filed late, a careful review reveals that Petioner's Notice of Motion and Motion to Remand to State Court, Request for Sanctions was timely filed on Monday July 31, 2000 [within 30 days of being served with removal notice]**.[See docket # 25-ER 448]** Once the Petitioner / Plaintiffs were finally served, MTA had an obligation to file a new Notice of Removal, on all parties in that the earlier Notice of Removal was void, in that it had not been served on the Petitioner/ plaintiffs prior to filing the document with the court, and of course any such later filing for removal would have been untimely. Confirmation of the late service on Petitoner /Plaintiffs can be found in District Court Docket #12. Additionally, the MTA failed to identify the alleged "federal question". Review of the Original Complaint revealed that no "federal question" was raised by Petitioners/Plaintiffs in the 128 allegations of Complaint, a requisite for federal jurisdiction.**[see-Appeal p 12.]**

Additionally, the removal was in violation of **28 U.S.C sec. 1445 (c)**, which prohibits removal of of a nonremova-

ble case, as defined therein. On such basis the district / appeals court had no jurisdictional authority to make any rulings in this case. A federal question is not created by defendant's assertion of an issue of federal law in defedant's pleadings or in the notice of removal. **(See People v. Kerr-McGee Chem. Corp. (7th Cir. 1982) 677 F2d 571, 575. [Also see Appeal p. 17]**

The court is reminded that MTA failed to Answer most of the allegations of the Second Amended Complaint [Allegations # 45 to 134]., which was never denied.

REASON FOR GRANTING THE PETITION

A. This case underscores the fact that the federal judges were clearly not familiar with, or chose to ignore current State of California workers compensation related laws and regulations required to adjudicate workers compensation law related related claims. Especially, in light of recent budgetary cuts to the federal court system, for cost containment purposes it would appear to be most prudent, that the lower courts judiciary's time, and court resources, would be better spent, entertaining cases over which the district / appeals courts hold clear jurisdictional authority, and where in question such cases should be remanded.

This is especially true in light of the Supreme court's ruling that the district/ appeals courts cannot create jurisdiction to rule on merits where subject matter jurisdiction is lacking as set forth herein. Continued circumvention of the Supreme Court's ruling will continue

to cause an unnecessary drain upon the taxpayers of the United States. For example, the present case is now entering it's seventh year, in the federal court system, whereby there have been repeated attempts to substitute and apply federal law.... in a case that requires state laws and regulations for adjudication, as provided in the state's constitution, the rulings of the state's Supreme Court, and supporting case law including the leading case on the state's exclusivity, **[Vacanti v. State Comp. Insurance Fund].**

B. Because of the arbitrary rulings, and oftentimes contradictory rulings amongst Appellate cicuits pertinent to the issue of lack of subject matter jurisdiction, and "non-removable cases" as defined by **28 U.S.C. sec. 1445 (c)**, this case presently before the Supreme Court is very important, in that a clear ruling will serve as a hallmark, and guide for future district / appeals court jurisprudence, to prevent this type of waste for which the taxpayers must ultimately foot the bills.

C. The Appellate cirucuits are presently struggling to such an extent, that the instant case serves to underscore the fact that ... different and totally opposite rulings pertinent to **1445 (c)** have been applied...by two different circuits, to the same "interested party" in this case.

As the owner of Hertz Claim Management in this case, American Airlines is an interested party, which in this case benefited from the ruling of the Ninth Circuit Panel in that it ruled that protection under **sec. 1445 (c)**

is a nonjurisdictional "waivable" right.

This ruling is contradicted by the 5th Circuit's ruling that, removal of claim arising under workers compensation laws of a state is prohibited by statue regardless of whether jurisdiction is based on diversity or federal question. **28 U.S.C. section 1445 (c) *Sherrod v. American Airlines Inc* 132 F 3d 1112 (5th Cir. 1998)**

- By inference the latter would clearly raise the issue of subject matter jurisdiction if such a case was to be removed and raising such an issue is "nonwaivable" as set forth herein, and clearly "jurisdictional" in nature.

D. The rulings of the Ninth Circuit, whereby there is an attempt to "create subject matter" for jurisdiction for itself and federal court, contradict the rulings of the United States Supreme Court, including but not limited to the court's finding that, a federal court is of limited jurisdiction, and may adjudicate only those cases authorized by the Constitution and by Congress, Unlike states they have no inherent or general subject matter jurisdiction **(See *Kokkonen v. Guardian Life Insurance Co. of America (1994)* 511 U.S., 375, 377, 114, S.Ct. 1673, 1675, 1677 (994); *Finley v. United States (1989)* 490 US 545, 109 S. Ct. 2003, 2008).**

The Supreme court found that Article III jurisdiction will not be assumed for the purpose of deciding a case on the merits (hypothetical) jurisdiction, even where the legal issues could be readily resolved. **–See [Steel Co. v. Citizens for Better Environment, supra, 523 U.S. at 101-102, 118 S. Ct. at 1016].**

Consistent with the United States Supreme Court related rulings, the Montana Court of Appeals has clearly decided that if a *case* is improperly removed, the federal court must remand because... it has no subject matter jurisdiction to decide the case. – **Arco Environmental Remediation, LLC v. Department of Health and Environmental Quality of Montana, 213, F. 3d 1108.**[As set forth in Petition For Full Court Hearing by Petitioner Delaney E. Smith Jr.,M.D.]

E. The Ninth District Court decisions, pertinent to sec. 1445 (c) imposes the burden on District court of having to entertain cases in which they have no jurisdictional authority to adjudicate the causes of action, when facts of the case are inextricably interwined in state workers compensation laws and regulations, and done so at great waste and expense to our taxpayers and the affected petitioner, who should be entitled to sanctions, including attorney fees for illegal defense [in district court], and wrongful removal.

The Ninth Circuit's primary error which led to it's present position, concerning whether violations of the federal statue **Title 28 U.S.C. section 1445 (c),** which defines workers compensation law related cases as being "non jurisdictional" was plainly set forth for the Ninth Circuit Appeals court, in the Petitioners petition entitled "Addendum to, Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction etc....."

As set forth therein, the Appeals Court Memorandum overlooked the fact that in citing **Vasquez v. North County Transit Dist. 292 F 3d 1049, 1061 (9th Circ. 2002),**

the Ninth Circuit's ruling was also based upon an earlier ruling **[Williams v. AC Spark Plugs Div. of General Motors Corp., 985 F 2d 783m 786 (5th Circ. 1993)]**. In that 1993 ruling the 5th Circuit Court found that due to diversity of citizenship, the **Williams v. AC Spark Plugs** case was within the jurisdiction of the federal court. There is no such diversity issue in the instant case that was presented to the Ninth Circuit Court of Appeals, and which in now presently before this most distinguished body.

In the earlier case of 1993... **Williams v. AC Spark Plugs** the 5th Circuit court did rule, as the Ninth circuit would rule in this case, that ....even if **1445** applies... it's bar against removal of workers compensation claims is nonjurisdictional and may be waived. Regarding the case now before for the court, even more important than the fact there is no diversity issue to create federal jurisdiction, is that the Ninth Circuit Panel overlooked the fact that the 5th Circuit Appeals Court had later changed it's position regarding **28 U.S.C. sec. 1445 (c)**...but the Ninth Circuit continued to cite the earlier 5th Circuit ruling.

In 1998, the finding of the 5th Circuit was that a plain reading of the statue lends credence to the proposition that **sec. 1445 (C)** prohibits the removal of any state workers compensation claims. The court held that **sec. 1445 (c)** prohibits removal of any state workers compensation claims whether jurisdiction is based on diversity or federal question. **Sherrod v. American airlines Inc., 132 F 3d 1112 (5th Circuit 1998)** [See Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction....etc p. 7.

Stated another way, outdated rulings of the 5th Circuit Appeals Court were directly and or indirectly applied to the instant case, when the Ninth Circuit Court of Appeals overlooked the fact the 5th Circuit Appeals Court had since reversed itself on the earlier 5th Circuit (1993) ruling as set forth above.

Regarding the matter of subject matter jurisdiction, and it's application to the matter of State of California workers compensation law based cases, the lead state of California Supreme Court case which established the "exclusivity of state court"...**Vacanti v. State Compensation Ins. Fund, 24 Cal. 4th 800 (2001)** was cited by judge Nora Manella of the District Court- **See Order Granting in Part and Denying in Part Defendant Presidium/ Cambridge's Motion to Dismiss.- An excerpt was attached as Exhibit A to Petition for Full Court Hearing...etc.**

In recognizing the exclusivity of the Workers Compensation Appeals Board WCA [WCAB], as set forth in Vacanti...the District Court at that point was obligated to address the issue of it's subject matter jurisdiction, in light of the State of California's Supreme Court ruling, as well as it jurisdictional authority under such circumstances to dimiss any aspect of a state of California workers compensation law related case. The ruling of the Appeals court, in supporting the rulings of the District court, contradicted it's own earlier ruling, whereby the 9th District had found that, when interpreting state law, the Court of Appeals is bound to follow the decisions of the state's highest court, **See Vasquez v. North County Transit Dist. 292 F 3d 1050 (9th Cir. 2002).**

Additionally, the Ninth Circuit Court of Appeals overlooked the fact, that since the MTA's removal to federal court was based upon an alleged... "federal question", there is no 30 day time waiver. While the Ninth Circuit's Memorandum ruled that..."Smith failed to timely object to removal and thus waived any objection on that

basis" citing **Vasquez v. North County Transit Dist.**, the Appeals court overlooked the fact that the same case makes it clear that, a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the Notice of Removal. **See Vasquez v. North County citing N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co. 69 F 3d 1034, 1038 (9th Circ. 1995).**

Finally, the U.S. Ninth Circuit Court of Appeals made rullings in an illegally removed case, that was inextricably intertwined in State of California workers compensation law. State of California law specifically prohibits filing petitions for rulings on the pleadings and thus requires a hearing for judgement on the pleadings, as set forth in **Title 8, California Code of Regulations section 10490** which prohibits even the filing of demurrers, petitions for judgement on the pleadings, and petitions for summary judgement, as such defenses are not permitted under this California law. Only the **United States Supreme Court** can enter rulings that might otherwise appear to contradict state law. If there is any question as to whether such a case should have been remanded to state court, the U.S. Court of Appeals is obligated to remand the case under existing federal law, as clearly set forth in the Amended Appeal filed with the U.S. Ninth Circuit Court of Appeals by this petitioner.

In the 1993 earlier mentioned, 5th Circuit case, Circuit court judge Jerry E. Smith held that (1) wrongful removal of civil action arising from state's workers compensation laws was a procedural defect that was waived when plaintiff failed to move for remand within 30 days. **See Williams v. AC Spark Plugs 985 F 2d 783 (5th Cir. 1993).**

As stated above, the U.S. Ninth Circuit Court of Appeals overlooked the fact that the 5th circuit had already reversed itself (1998) at the time of the 2002 Ninth Circuit ruling, whereby in **Vasquez v, North County Transit...citing Williams v. AC Spark Plugs** in that case...the Ninth circuit ruled **[1445 (c)]**, it's bar against removal is non-jurisdictional and may be waived. **See Vasquez v. North County Transit Dist. 292 F 3d 1049, 1062.**

The basis for the Petioner's Motion for Remand was was repeatedly, "lack of subject matter jurisdiction". Unlike other defenses, and in contradiction to the Memorandum, the defense of lack of subject matter jurisdiction is never waived. Accordingly, issue of subject matter jurisdiction should have been adequately addressed prior to the disposition of the case by the U.S. Court of Appeals, that is in a manner that is consistent with **sec. 1445 (c),** as the expressed intent of Congress. The 5th Circuit Court of Appeals has ruled that, courts must presume that a legislature says in a statue what it means, and when the words of a statue are unambiguous, the first canon is also the last, and judicial inquirie is complete – **In re-Hart, 328 F. 3d 45.**

It is hereby respectfully requested, that the United States Supreme Court intervene at this time to clarify the intent of the United States Congress, as expressed through federal statue **Title 28 U.S.C. section 1445 (c)** to repair the present split between the Circuits, as to whether violations are "procedural" and therefore waivable after 30 days, or is "jurisdictional" and therefore a non-waivable right to protection of forum selection in state of workers compensation law related cases.

Conclusion

For the foregoing reasons, a Writ of Certiorari prayerfully will be granted. A clear and final statement from the United States Supreme Court, that strongly prohibits removal and offers clear sanctions of attorney fees, and all other payments of retribution deemed apppropriate, for wrongful removals and violations of **1445 (c)**, will serve as a disincentive for those who now frequently attempt to circumvent governing state laws and regulations, for the purpose of delaying and or evading payments of uncontested bills for medical services rendered, by deliberately contravening the law.

The district / appeals courts in this case attempted to substitute federal law for state of California workers compensation regulations. For instance in the case of workers compensation related fraud... "intent" is not a prong, or element that must be proven to establish fraud, and the ruling of the Appeals court would heighten the bar needed to establish workers compensation fraud.

Under existing California law workers compensation law, fraud can be established by merely demonstrating that false statements were made, to avoid making workers compensation related payments for benefits, that include payment for medical services rendered to injured workers. In this case the petitioner presented the conflicting Admissions, of the MTA and Travelers, and the related contract when the MTA made the claim that in 1998 Travelers insured the MTA's workers compensation program. In actuality Travelers began offering only "reinsurance coverage", for the MTA's self insured workers

compensation program. **[See Appeal p. 25, ER p. 120, 342-350]. There should be no question as to whether the issues of the case are workers compensation law related. [See Appeal 29,30,31,32,33,38,39,40] Appeal ER p. 7,100,102]** The MTA and Travelers had earlier claimed that because of an alleged insurance contract with Travelers, the Baldwin Hills Medical Group (BHMG) had to be deleted from MTA's Panel of treating physicians. After deleting BHMG from MTA's medical panel, MTA continued to take PPO deductions from payments made for services rendered by BHMG's medical providers, including the petitioner Dr. Smith, at fees well below those required by the state's industrial fee schedule as set forth in **labor code 5307.1.**

The case was workers compensation law based and both the Petitioner, the Respondents and even the judge all aluded to to specific workers compensation laws and regulations required to adjudicate the case, such as those set forth herein. Presidium attorney Eric Schnurpfeil and Travelers attorneys Holmes and Crawley made false claims, and or inferences that Presiidium / and Travelers, were not bound by **labor code 4603.2**, and that the code was not applicable, at about the same time respondent Presidium/ Cambridge was being fined by the the State of California Department of Industrial Relations for this same code violation in still another case..., and such evidence was provided for judicial review [See Stipulation to Corrective Action, Remdial Measures, and Assessment of a Civil Penalty **(Labor Code sec. 129.5)** and Order Re Findings by the Administrative Director Based Upon Stipulations – Attached as a part of Exhbibit

B to Objection to Notice of Appearance filed by Attorney Eric Schnurpfeil to Make Appearance for Presidium; Cambridge Integrated Services; AON and Request for Judicial Notice- which Appeals court had an obligation to review]. The U.S. Appeals court failed to consider evidence of attorney fraud submitted for judicial review, for the purpose of establishing, "fraud upon the court".

In still other cases the employer MTA has been sanctioned for as much as $75,000.00...specifically for failing to pay monies owed to the Baldwin Hills Medical Group for services rendered to MTA's injury workers [See James Belcher v. LACMTA c/o Constitution State Services [Travelers] -Opinion and Order Approving Compromise and Release [on penalties and interest] Case Number(s) MON 206079; MON 215489; MON 230321; VNO 370718- State of California Division of Workers Compensation. In one such case in which a patient Sedgwick Mc Cray, chose to exercise his right to designate Dr. Smith/BHMG as his physician, only to have counsel for MTA the file false documents with the WCAB to facilitate the transfer, alluded to in allegation 21 SAC [See Appeal ER p. 184].

After the WCAB Administrative Director determined that counsel had made false claims in an attempt to facilitate transfer of care, counsel for MTA then made false claims in a complaint filed against Mr. Mc Cray, in Superior Court, which included the assertion that Mr. Mc Cray had been seen on video tape performing activites in violation of his physician's restrictions. As orthopedic specialist William Simpson M.D. reported, his review saw no such violations, because at the time of the video there

were no physicial restrictions except that the patient should not yet drive a bus due to public safety concerns. The employer and counsel made false claims to support the wrongful termination of the injured worker Sedgwick Mc Cray, and thereby engaged in workers compensation fraud. The case was dismissed by Superior Court, because it was a WCAB law related matter that did not allege a civil conspiracy or RICO violations and accordingly should not have been filed in state court [Superior Court] as set forth in the **Vacanti case**. The employer and counsel used the United States Postal Service- **See Los Angeles County Metropolitan Transportation Authority v. Sedgwick Mc Cray. [BC250377 Superior Ct.] (2001)**. Retalliation because the patient refused to be transferred to MTA's physicians was improper.

Still other related WCAB rulings were attached to the Second Amended Complaint as Exhibits 20, 21, overwhich the district / appeals courts had no authority to weigh, evaluate, or change according to prior rulings of the Ninth Cicuit. Lacking the authority to review or weigh a state appeals court findings, the district ./ appeals court had an obligation to remand the case to the court from which it had been removed.

The district / appeals courts had no jurisdictional authority and should have remanded the case to state court from which it had been removed in violation of 1445 (c). No court in the United States, except for the United States Supreme court can rule on merits of a state of California workers compensation law related case based

upon the pleadings, and for any court to do so is a violation of **Title 8 California Code of Regulations 10490,** which prohibits rulings on the pleadings [without a trial].

Consistent with State of California Supreme Court rulings in the Vacanti case, the case before the Supreme court was appropriately filed in state court [superior court] because the causes of action were intertwined with allegations of "conspiracy". The antics of counsel that began with the wrongful removal of the case from state court, has caused a nearly 7 year delay in adjudication of perfectly valid claims for restitution, through a variety of undeserved, demonstrations of "bad faith" and illegal attorney conduct, as set forth herein. Only one Appellee the MTA filed a response to the Appeal, and the petitioner, requests all appropriate related sanctions, including attorney fees incurred while in the district court.

SUMMARY

The district / appeals courts have no jurisdictional authority to make rulings where subject matter jurisdiction is lacking, except for the authority to make the decision to remand the case to the court from which it has been illegally removed. State law workes compensation claims cannot be removed to federal court, regardless of whether removal jurisdiction is based on diversity or a federal question. ***[28 U.S.C. sec. 1445 (c); Humphrey v. Sequentia, Inc*** (8th Cir. 1995) 58 F. 3d 1238, 1245].

There is no related 30 day statue of limitations waiver of rights in such cases, or matters that include allegations of fraud upon the court, or extrinsic fraud. Under Califor-

nia law, if judgment is obtained through extrinsic fraud, time limitations contained in statue governing motions to vacate judgments do not apply. West's Ann. Cal, Civ. Code sec, 473 In re Lake, 202 B.R. 751. Rulings on the pleadings, and merits of case by district / appeals courts was done in violation of state of California law C.C.R 10490, which prohibits the filing of Motions for rulings on the pleadings and for summary judgment.

Issues of credibility, and related causes of action for fraud, and fraud upon the court, and workers compensation related fraud require a trial, under California state and or federal law. The district / appeals court lack the jurisdictional authority to make rulings on merits of case in the absence of a trial.

Distict / appeals court lack the jurisdictional authority to order parties into arbitration, or to confirm, or enter the results without a hearing or trial to first determine the parties to such arbitration. Delaney and Stephanie Smith as non-parties refused to arbitrate, the court lacked the jurisidictional authority to order the parties to arbitrate as did occur in this case. Jurisdictional authority to order arbitration does not extend to district courts, when the arbitration agreement specifically requires that state law is to govern the proceeding, as set forth herein.

Original Submitted, 12/11/06
Change of Format, 2/4/07

Next Revision, 4/23/07
By Petitioner: _____

Delaney E. Smith Jr.,Pharm.D.,M.D.
P.O. Box 78159
Los Angeles, California 90016
28

APPENDIX page 1a.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 00-5986 NM (CWx)

BALDWIN HILLS MEDICAL GROUP CORPORATION, a California Medical Corporation, DELANEY E. SMITH JR.,M.D, an individual, STEPHANIE SMITH, an individual,

Plaintiffs,

v.

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY, et. al.

Defendants,

ORDER VACATING PLAINTIFFS' MOTION FOR REMAND AND REQUEST FOR RULE 11 SANCTIONS

Plaintiffs filed a Motion for Remand and Request for Rule 11 Sanctions on July 31, 2000. In this motion, plaintiffs failed to allege compliance with Local Rule 7.4.1, which requires a pre-filing conference of counsel. Plaintiffs are reminded that Rule 7.4.1 requires not only this prefiling meeting but also a statement to the following effect; "This motion is made following the conference of

counsel pursuant to Local Rule 7.4.1 which took place on (date)." Local Rule 7.4.1. Because of its failure to allege compliance with the meet and confer requirements of the Local Rules, plaintiffs' Motion for Remand and Request for Rule 11 Sanctions is vacated and taken off calendar, with leave to refile at a later date following compliance with Local Rule 7.4.1.

DATED: August 7, 2000

Nora Manella
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO. CV00-05986-NM(CWx)

TITLE: Baldwin Hills Medical Group et al

v.

First Health

PRESENT: HON. NORA M. MANELLA, JUDGE

Judith Hurley	N/A
Deputy Clerk	Court Reporter

ATTORNEY FOR PLAINTIFF	ATTORNEY FOR DEFENDANT
N/A	N/A

PROCEEDINGS: IN CHAMBERS

(Re Plaintiffs motions set for 8/11/03)

On June 25, 2002, Plaintiffs filed a motion to remand the instant action on the ground that it was improperly removed from Los Angeles Superior Court over two years ago. The instant action was properly removed from Los Angeles Superior Court over two years ago. The instant action was properly removed to this court, as Plaintiffs asserted federal claims under 42 U.S.C. sec

1983 and 1985 for alleged violations of their civil rights. See Caterpillar Inc., v. Williams, 482 U.S. 386, 392-393 (1987). Although Plaintiffs other claims would not have invoked the jurisdiction of this court, the presence of Plaintiffs' federal civil rights claims allowed Defendants to remove the entire case. See Wiscounsin Dept. of Corrections v. Schact, 524 U.S. 381, 386 (1998). That Plaintiffs' claims included allegations of regarding the workers system is immaterial, as Plaintiffs' claims did not "arise under" California workers compensation law. See Vasquez v. City of San Diego, 292 F. 3d 1049, 1061 (9th Cir. 2002). Moreover 28 U.S.C. sec. 1445 (c) prohibition against removal of workers compensation claims is non-jurisdictional and may be waived. See id at 1063. As Plaintiffs did not file a motion to remand the case within 30 days after the notice of removal, as required by 28 U.S.C. sec. 1447 (c), Plaintiffs waived any objection to the removal of the action.

Accordingly, the court **DENIES** Plaintiffs' motion to remand the action to Los Angeles Superior Court.

On July 8, 2003, Plaintiffs filed a motion for a rehearing of the Court Clerk's entry to tax costs and for a stay of judgment pursuant to Fed. R. Civ. P. 54(d)(1). Plaintiffs' motion challenges the awarding of costs to Defendants Travelers Indemnity Co., Travelers Indemnity Co. of Illinois and Constitution State Service Company (collectively, "Travelers"). Plaintiffs assert that they should not have been billed for a videotaped deposition; (2) the deposition exceeded seven hours; (3) more than one deposition form the same person was obtained; and (4) this court lacked jurisdiction to enter judgment.

Plaintiffs motion is **Denied.**First Travelers sought costs for the written transcripts of Dr. Smith's deposition only. See Holmes Decl. Ex., A. Second, Rule 30(a)(2)(B) allows a deposition to exceed 7 hours if parties so stipulate. See Reyna Decl. para. 5 Moreover, each of the nine Defendants was entitled to depose Dr. Smith. As his deposition lasted only three days, it is unlikely that each party's portion of the deposition exceeded the seven hour limit. Third, Dr. Smith's deposition was twice continued, not "renoticed" as Plaintiffs assert. See Reyna Decl. para 2-4. Fourth, for the reasons set forth above, this action was properly removed to this court; accordingly, the court had jurisdiction to enter judgment.

Included in Plaintiff's motion to retax costs is a motion for reconsideration of the court's order granting the Los Angeles MTA's motion for Summary Judgment. Plaintiffs rely on the Supreme Court's recent decision in Desert Palace, Inc. v. Costa 123 S. Ct. 2148 (2003). See Motion para. 14. There, the Supreme Court held that a plaintiff may establish a mixed motive employment discrimination claim based on circumstantial evidence. Contrary to Plaintiffs' assertion, Desert Palace, does not stand for the proposition that a plaintiff may rely on conclusory allegations to defeat motion for summary judgment. As set forth in the court's order of April 29, 2003, the record was devoid of evidence supporting Plaintiffs conclusory allegations that the Los Angeles MTA maintained a policy or custom of discriminating against Plaintiffs or other DBE medical providers. See 4/29/03 Order. Accordingly, Plaintiffs Motion for reconsideration is **DENIED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO. CV 00-05986-NM (CWx) DATE: 8/27/03

TITLE: Baldwin Hills Medical Group, et al
v.
Los Angeles Metropolitan Etc., et al

PRESENT: HON. NORA MANELLA, JUDGE

Judith Hurley	N/A
Deputy Clerk	Court Reporter

Attorney For Plaintiff	Attorney For Defendant
N/A	N/A

PROCEEDINGS IN CHAMBERS

Plaintiffs are Ordered to Show Cause, in writing no later that 9/4/03, why this action should not be dismissed for failing to arbitrate any claims against First Health, pursuant to this Court's order of 4/20/01.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT COURT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO. CV 00-05986- NM(CWx) DATE: 2/9/05

TITLE: Baldwin Hills Etc. – v Los Angeles Metropolitan, Etc,, et al

PRESENT: HON. NORA M. MANELLA, JUDGE

Judith Hurley
Deputy Clerk

N/A
Court Reporter

ATTORNEY FOR PLAINTIFF ATTORNEY FOR DEFENDANT

N/A N/A

PROCEEDINGS: Order Denying Plaintiff's Motion to Vacate Dismissal & Remand Original Complaint.

On December 17, 2004 Plaintiff Delaney E Smith Jr.,M.D. ("Plaintiff"), filed a Motion to Vacate Dismissal and Remand Original Complaint. Although Plaintiff's motion is at times incoherent and disjointed, the motion essentially seeks to vacate all rulings in this matter and to remand the action to Los Angeles Superior Court, because this court allegedly lacks subject matter jurisdiction. Plaintiff reasserts the same arguments the previously raised in

his Motion to Remand filed on June 25, 2003, which the court denied on August 5, 2003.

As the court stated on it's August 5 order, the instant action was properly removed to this court, as Plaintiffs asserted federal claims under 42 U.S.C. sec. 1983 and 1985 for alleged violations of their civil rights. See Caterpillar Inc. v.Williams, 482 U.S. 386, 392 (1987) 1 Although Plantiffs' other claims would not have invoked the jurisdiction of this court, the presence of Plaintiffs' federal civil rights claims allowed Defendants to remove the entire case. See Wisconsin Dept. of Corrs. v. Schacht, 524 U.S. 381, 386-87 (1998). That Plaintiffs claims included allegations regarding the workers compensation system is immaterial, as Plaintiffs' claims did not "arise under" California workers compensation law. See Vasquez v. North County Transit Dist (NCTD) 292 F. 3d 1049, 1061,, (9th Cir. 2002). Moreover, 28 U.S.C. sec. 1445 (c)'s prohibition against removal of workers compensation claims is non jurisdictional and may be waived, See id at 1062; Williams v, AC Spark Plugs Div. of Gen. Motors Corp., 985 F 2d 783, 786 (5th Cir. 1993) (1445 (c)'s "statutory restriction against removal is not a matter of substantiative jurisdiction, but rather a procedural defect that the [plaintiff] waived"). As Plaintiff did not file a motion to remand the case within 30 days after the notice of removal, as required by 28 U.S.C. sec. 1447 (c). Plaintiff waived any objection to the removal of the action.

Plaintiff further argues, based on vague references to fraud on the court, that the court's prior orders granting

summary judgment to various defendants should be vacated. The court granted summary judgment to: (1) Hertz Claims Management on February 5, 2003; (2) Los Angeles County Metropolitan Transit Authority on April 29, 2003; (3) Presidium Inc., Cambridge Integated Services Group, Inc and AON Corporation on May 21, 2003; and (4) Travelers Indemnity Company, Travelers Indemnity Company of Illinois, and Constitution States Service Company on May 28, 2003. Pursuant to Federal Rule of Civil Procedure 60 (b),, a motion for relief from from a final judgment or order based upon fraud must be made within a reasonable time. but not more than one year after judgment or order was entered. Fed. RI Civ P. 60 (b) Plaintiff's instant motion wa filed more than one and a half years after the summary judgement orders were entered, and is therefore time barred.

1. This action was originally filed by Plaintiffs Baldwin Hills Medical Group Corporation, Delaney E. Smith Jr.,M.D., and Stephanie Smith (collectively, Plaintiffs").

Accordingly, the court **DENIES** Plaintiff's Motion to Vacate Dismissal and Remand Original Complaint. Plaintiff is reminded that a person "who multiplies the proceeding in any case unrreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct. 28 U.S.C. sec. 1927. While the court declines, in it's discretion, to award sanctions for the instant motion, in the future, any similarly frivolous motions will be subject to sanctions.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUG 04 2006

No. 05-55370

D.C. No, CV-00-05986-NM

MEMORANDUM*

BALDWIN HILLS MEDICAL GROUP, a California Medical Corporation; STEPHANIE SMITH, an individual,

Plaintiffs, and

DELANEY E. SMITH JR.,M.D.

Plaintiff-Appellant, v.

LOS ANGELES COUNTY METROPOLITAN TRANSPORTA-TION AUTHORITY et. al.

defendant/appelle

and

TRAVELERS INDEMNITY COMPANY; TRAVELERS INDEMNITY COMPANY OF ILLINOIS; CONSTITUTION STATE SERVICE CO; AFFORDABLE MEDICAL NETWORK; FIRST HEALTH,

defendants,

Appeal from the United States District Court
for the Central District of Califonia
Nora M. Manella, District Judge, Presiding

Submitted April 6, 2006**

Before:
FARRIS, BOOCHEVER, and LEAVY, Circuit Judges

Delaney E. Smith Jr.,M,D. (hereinafter "Smith") appeals pro se the district court's judgment in favor of defendant-appellee Los Angeles County Metropolitan Transit Authority ("MTA"). We have jurisdiction pursuant to 28 U.S.C. sec. 1291 and we affirm.

The parties are familiar with the procedural history. Smith first argues that the district court lacked jurisdiction because his claims arise under California workers compensation law, and therefore, 28 U.S.C. 1445 (c) [1] bars removal to federal court. We disagree.

Smith's complaint alleged violations of 42 U.S.C. sec. 1983 and 1985. Therefore, the district court had jurisdiction pursuant to 28 U.S.C. sec. 1331. ("The district

** This case unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34 (a)(2).

1. U.S.C. sec. 1445 (c) " A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States".

courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). Removal was available because the district court had original jurisdiction to the claim under federal law. Removal was available because the district court had original jurisdiction to decide the claim arising under federal law. 28 U.S.C. sec. 1441 (b). Assuming, only for the purpose of argument, that Smith's claims are ones "arising under" California Workers Compensation law, Smith filed an amended complaint in federal court. In these circumstances, Smith's claims may be properly as having been initiated in federal court. Vasquez v. North County Transit Dist. 292 F. 3d 1049, 1061 (9th Cir. 2002) Moreover, Smith failed to timely object to removal and thus waived any objection on that basis. Id. at 1062 ("Even if sec. 1445 (c) otherwise applies here, it's bar against removal of workers' compensation claims is nonjurisdictional and may be waived.")

Smith argues that the district court erred in granting summary judgment to MTA. The district court determined that Smith failed to establish a prima facie case of racial discrimination, therefore the issue is waived. See Mendoza v. Block 27 F. 3d 1357, 1363 (9th Cir. 1994) (stating that failure to raise an issue in an opening brief results in waiver of the issue on appeal). Our review of the record leads us to conclude that the district court did not improperly weigh the evidence, determine credibility, or apply erroneous legal standards in granting motion for summary judgment.

Smith argues that the district court lacked authority to compel arbitration with one defendant. The record

discloses that several of Smith's contracts contained clauses requiring arbitration of "any problems or disputes" arising under the contracts. We have construed such clauses as extending to every dispute with a significant relationship to the agreement. " The existence of an agreement to arbitrate establishes a federal presumption in favor of arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). Accordingly the district court did not err in ordering arbitration.

We reject Smith's contention that the district court erred in denying the motion to recuse Judge Nora Manella for personal bias or prejudice, pursuant to 28 U.S.C. sec. 144. We review the denial of a motion for recusal for an abuse of discretion. See United States v. Scholl, 166 F. 3d 964, 977 (9th Cir. 1999). Judge Ronald Lew determined that the statements of the mediator were insufficient to ascribe a political leaning to Judge Manella and were not, in any event, directed at Smith individually. See United States v. Carignan, 600 F. 2d 762, 764 (9th Cir. 1979). There was no abuse of discretion in the denial of the motion for recusal.

Finally, we reject Smith's contention that the judgment should be vacated based upon fraud upon the court, Fraud upon the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in it's decision." Pumphrey v. K.W. Thompson Tool Co., 62 F. 3d 1128, 1131 (9th Cir. 1995)(internal citation omitted). The record does not support Smith's

contention of fraud or misconduct that harmded the integrity of the judicial process or resulted in a miscarriage of justice. The district court did not abuse its discretion in denying Smith's motion. We deny Smith's motions for judicial notice and we deny the motion to notice newly discovered evidence, No further motions for judicial notice or sanctions in this case will be considered by this court without the permission of the Appellate Commissioner.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-55370
D.C. No CV-00-05986-NM
Central District of California
Los Angeles,

Baldwin Hills Medical Group Corp., a Califorjnia Medical Corporation; Stephanie Smith, an individual

Plaintiffs,

and

Delaney E. Smith Jr.,M.D.

Plaintiff – Appellant

v.

Los Angeles County Metropolitan Transportation Authority; Hertz Claim Management Corporation; Presidium Inc; Cambrdige, e/s/a Cambridge Integrated Services Group Inc; AON Corporation,

Defendants – Appellees

and Travelers Indemnity Company; Travelers Indemnity Company of Illinois; Constitution State Service Co; Affordable Medical Network; First Health,

Defendants,

ORDER
Filed September 15, 2006

Before:FARRIS, BOOCHEVER, and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P 35.

The petition for panel rehearing and petition for rehearing en banc are DENIED.